IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1193 OF 1993

1. Smt. Pratibha Sheth
   11/170, Adarsh Nagar,
   Near Century Bazar,
   Bombay - 400 025.

2. Shri Hotchand S. Bhatia
3. Smt.Madhubala H. Bhatia
   both residing at
   Flat No.1, Shanti No.3,
   19, Pedder Road,
   Bombay - 400 023. .. Petitioners.

V/s.

1. (i) S.C. Prasad
       Chief Engineer.

   (ii) S.C. Tiwari,
       Commissioner of Income tax

   (iii) C.M. Betgeri
       Commissioner of Income tax

   Members of the
   Appropriate authority
   appointed by Central Government
   u/s.269UB of the I.T. Act, 1961
   having its office at 3rd Floor
   Mittal Court, "A" Wing,
   Nariman Point, Bombay

2. Union of India .. Respondents.

Mr.Shyam Diwan, senior counsel i/b. Mahumtura & Co. for the petitioners.

Mr.R. Asokan for the respondents.

CORAM : V.C. DAGA &
J.P. DEVADHAR, JJ.

DATED : 26TH SEPTEMBER, 2005.

ORAL JUDGMENT (PER V.C. DAGA J.) :

1. This petition is directed against the order dated April 27, 1993 (Exhibit "F") passed by the first respondent, the Appropriate Authority, appointed by the Central Government under Section 269UB of the Income Tax Act, 1961 (‘the Act’) exercising right of pre-emptive purchase under Section 269UD (1) of the Act of the property in question owned by the petitioner Nos.2 and 3 for the apparent consideration of Rs.24,00,000/-.

THE FACTS :

The facts in short are :

2. The petitioner No.1 is an intending purchaser; whereas petitioner Nos.2 and 3 are the owners of the immovable property being residential apartment/flat admeasuring about 767 square feet situate at 103, Miranda Apartments, Veer Sawarkar Marg, Bombay - 400 014 (‘the said property’).

3. The petitioner Nos.2 and 3 entered into an agreement of sale on 6th February 1993 to sell their property for a total consideration of Rs.24,00,000/- in favour of petitioner No.1. The entire payment of

Rs.24,00,000/- was paid by the first petitioner to the vendors, the petitioner Nos.2 and 3 immediately on signing of the said agreement. Apart from this, the first petitioner had also incurred expenditure in the sum of Rs.1.89 lacs by way of registration fee.

4. The Finance Act of 1985 has introduced Chapter XX-C in the Act providing for compulsory purchase by the Central Government of immovable properties in certain cases of transfer. In view of the introduction of Chapter XX-C, the petitioners applied for no objection in Form 37-I to the Appropriate Authority with a request to issue "No objection certificate" to transfer the property in question described hereinabove as per the agreement of sale dated February 6, 1993 in favour of the first petitioner.

5. The Appropriate Authority after receipt of the statement in the prescribed form 37-I, from the parties, issued a show cause notice dated April 13, 1993 (Exhibit ‘C’) to show cause as to why the order should not be made against the transferor and transferee in accordance with the provisions of Section 269UD (1) of the Act.

6. The petitioners, pursuant to the above

notice were called upon to appear before the members of the Appropriate Authority at Bombay with their written submissions. The petitioners, after receipt of the said show cause notice, filed their reply vide their reply dated April 23, 1993; wherein the petitioner No.1 had, inter alia, pointed out a sale instance dated February 3, 1993 (exhibit 'J') in respect of a flat located in, 'Hrishikesh Apartment'; which is situated in the same locality viz. on the main Veer Sawarkar Marg, wherein the subject property is situate. The respondents had given their 'No objection certificate' for the said transaction, which according to the petitioners had reflected comparatively lower market value compared to the subject transaction.

7. The Appropriate Authority, after hearing the petitioners, vide its order dated April 27, 1993 held inter alia; that this was a fit case for pre-emptive purchase under Section 269UD (1) of Chapter XX-C of the Act. All submissions made by the petitioners were brushed aside by the respondent No.1. The respondent No.1 relied upon three sale instances which in the submission of the petitioners were non comparable with the subject transaction.

8. Being aggrieved by the aforesaid order dated

April 27, 1993 passed by the Appropriate Authority, the petitioners invoked writ jurisdiction of this Court under Article 226 of the Constitution of India to impugn the pre-emptive right of purchase exercised by the Appropriate Authority vide its impugned order dated April 27, 1993.

9. The petitioners, during the pendency of this petition, came to know that by an order dated May 16, 1993 bearing No.AA/Bom/Certs/11353/ 93-94, the respondent No.1, the Appropriate Authority has issued No-objection certificate permitting transfer of flat No.602 admeasuring about 690 square feet located on 6th floor of 'Miranda Apartment' situate at Veer Sawarkar Marg, Mahim, Mumbai 400 014. The agreement for sale of this flat was executed on March 27, 1993 (almost after a period of one month from the date of subject agreement) and the consideration agreed was in the sum of Rs.19.71 lacs which on calculation worked out to Rs.2,856 per square feet. As against in the subject agreement dated 6th February, 1993, as already stated hereinabove, the sale price was agreed to be at the rate of Rs.3,129 per square feet which was much higher than that of the transaction for which NOC was issued by the respondent No.1.

10. The petitioners have submitted that the flat

referred above which fetched a price of Rs.2,856 is on 6th floor whereas the subject flat is on the 1st floor of the said Miranda Apartment. He submits that in Mumbai higher floor apartments fetch more price. He submits that the petitioners were erroneously refused NOC by the Appropriate Authority; considering grant of NOC in respect of another flat on May 16, 1993 i.e. subsequent to the rejection of NOC in favour of the petitioners. This subsequent knowledge acquired by the petitioners was allowed to be brought on record by an amendment.

11. With the aforesaid material on record, the learned counsel appearing for the petitioners submitted that the impugned order passed by the respondents seeking to acquire the suit property by way of pre-emptive purchase, is erroneous, illegal, and suffers from total non-application of mind as such the same is liable to be quashed and set aside.

12. The learned counsel further submits that the show cause notice issued was vague and did not disclose any relevant material relied upon by the respondents, it did not specify any reasons or grounds for entertaining prima-facie; belief that the subject property was significantly under valued. The petitioners placed reliance upon the judgment of the

Division Bench of this Court in the case of **Nirmal Laxmi Narayan Grover V/s. Appropriate Authority (1995) Tax L.R. 355 (Bombay)** in support of their submissions.

13. The learned counsel for the petitioners further submits that the respondent No.1 has not recorded any positive finding that the suit property was significantly under valued and that such valuation was an attempt to evade tax. He further submits that the respondents did not determine fair market value of the suit property while passing the impugned order. He, thus, submits that the impugned order suffers from both procedural as well as substantive error and is liable to be quashed and set aside.

14. The petitioners further submit that assuming while denying that the respondents had reached to the prima-facie conclusion that there had been under valuation of the suit property by 15% with an attempt to evade tax, the petitioners submit that the said presumption is rebuttable. According to the petitioners, the respondents ought to have given fair and reasonable opportunity of being heard to the petitioners to enable them to rebut the presumption of tax evasion. He submits that the respondents not

only failed to disclose in the show cause notice the material relied upon by them and did not specify any reasons or grounds to reach a presumption of tax evasion.

15. The petitioners further submitted that the respondents ought to have disclosed two identical and contemporary transactions in respect of the residential apartment located in the same building known as, Miranda Apartments referred to hereinabove by the petitioners in respect of which the respondents did issue NOC under Section 269UL(3) of the Act, though the said transactions had disclosed comparatively lower sale price than that of the subject transaction. In addition thereof, the petitioners submit that the respondents while dealing with their contentions, in their counter-affidavit have taken totally contrary and inconsistent stand than that of the stand taken in the impugned order by stating that the rates of sale of two different flats in the said building were not comparable.

16. The learned counsel appearing for the petitioners, thus, submits that the impugned order is not only liable to be quashed and set aside but the petition is liable to be allowed with exemplary costs.

PER CONTRA :

17. Mr.Asokan, learned counsel appearing for the revenue conceded that so far as show cause notice is concerned it was vague. He also agrees that the sale transaction disclosed in the petition with respect to the flats located in the Miranda Apartment can be said to be comparable transactions. However, he submits that the impugned order be quashed and set aside and the matter be remanded back to the Appropriate Authority for reconsideration. In support of his submission he submits that while comparing the sale instances of the different properties, various facets of the property are required to be taken into account including its location, nature of construction etc. He, thus, prayed for remand for consideration afresh.

CONSIDERATION :

18. Having heard rival parties, this petition can be decided on a narrow issues based on undisputed facts. It is not in dispute that the show cause notice issued reads as under :

"No.AA/BOM/11145/93-94

Ofice of the Appropriate

Authority (Income-tax Dept.)
Mittal Court, A-Wing, 3rd Fl.
Nariman Point, Bombay 400 021

Dated : 13th April, 1993.

To,

Hotchand Sewaram Bhatia and
Madhuwala Hotchand Bhatia,
Flat No.1, Shanti No.3,
19 Peddar Road, Bombay 400 026 : Transferor

Pratibha Sheth,
11/170, Adarsh Nagar,
Near Century Bazar,
Bombay - 400 025 : Transferee

Sir/madam,

Please refer to your application in Form No.37-I under section 269 UC of the Income-tax Act, 1961 submitted in this office on 10th February, 1993 in connection with transfer of property being Flat NO.103, Miranda Apartments, Veer Savarkar Marg, Bombay - 400 014.

This letter is to request you to please show cause as to why an order should not be made in your case in accordance with the provisions of section 269 UD(1) of the Income-tax Act, 1961. For this purpose, you are requested to please attend before the Members of the Appropriate Authority in their office situated at Mittal Court, A-Wing, 3rd Floor, nariman Point, Bombay 400 021 on 23-4-1993 at 11.40 a.m. or to make your written submissions so as to reach this office on or before 23-4-1993 during office hours.

Seal Yours faithfully,
sd/-
(A.K. BENERA)
Deputy Commissioner of Income-tax,
for Appropriate Authority, Bombay."

19. The aforesaid show cause notice did not disclose any material relied upon by the respondents and/or specify any reasons or grounds for reaching

prima-facie belief that the suit property was significantly undervalued. Therefore, the petitioners did not know what case they had to meet at the hearing given by the respondents. The submission of the petitioners deserves acceptance that the show cause notice was vague and they were denied fair opportunity of being beard by the respondents, as such the impugned order is in violation of Section 269 UD (1) of the Act. This action of the respondents is in gross violation of the principles of natural justice.

20. The petitioners rightly relied upon the judgment of this Court in the case of Nirmal Laxmi Narayan Grover (cited supra) wherein the Division Bench of this Court has held thus :

> "In the absence of the particulars of the material or the reasons being disclosed in the show cause notice for entertaining a tentative or a prima facie belief that the value of the suit land is grossly understated in the agreement of sale between the parties, the transferor and the transferee have no real opportunity to meet the case of the Appropriate Authority or the Income tax Department concerned in that regard and hence there is non-compliance with the basic principles of natural justice."

In the above view of the matter, the impugned order is liable to be quashed and set aside being in breach of principles of natural justice.

21. The second contention raised by the petitioners that the prima facie conclusion reached by the Appropriate Authority that there had been under valuation of the suit property by 15% with an attempt to evade tax is a presumption which is rebuttable as such the petitioners were entitled to have an fair opportunity of being heard to enable them to rebut the presumption of tax evasion. The respondents not only failed to disclose in the show cause notice any material relied upon by them and did not specify reasons or grounds to reach the presumption of tax evasion but even failed to give a reasonable opportunity of being heard to the petitioners, the petitioners were given only four days time to reply and rebut the presumption raised against them. In our opinion, the said time given by the respondents was absolutely inadequate and as such the contention that the petitioners were denied reasonable opportunity of being heard needs acceptance. [See C.B. Gautam V/s. Union of India (1993) 199 ITR 530].

22. The next submission advanced by the petitioners that the respondents have failed to consider the evidence (sale instances), the details of which were available on record of the respondents.

In addition thereof, the respondents have alleged that the petitioners did not provide full details of sale instances of ‘Hrishikesh Apartment’ cited by them. The Appropriate Authority ought to have noted that the petitioners were not under obligation to lead any evidence, yet they have drawn attention of the Appropriate Authority to the material which was already available on their record. The petitioners had pointed out a transaction at Hrishikesh Apartment at Rs.17.5 lacs. However, the respondents have failed and neglected to consider the same while passing the impugned order. As such the impugned order is also liable to be set aside being vitiated by gross error of fact and law.

23. The petitioners are also right in their submission while criticising the impugned order that the respondents have failed and neglected to take into consideration two identical and contemporary transactions in the same building, ‘Miranda Apartment’ cited by the petitioners to which the respondents have issued NOC under Section 269 UL (3) of the Act, though the said transactions had disclosed comparatively low sale price than the petitioners transaction.

24. The learned counsel appearing for the

revenue could not dispute this fact that NOC was issued in respect of two transactions of the apartment located in the very same building in which the subject apartment is situated. If that be so, in our view no useful purpose will be served by remanding the matter with direction to the Appropriate Authority for denovo hearing.

25. The impugned order, thus, suffers from illegality on more than one count. In that view of the matter, the impugned order cannot stand to the scrutiny of law. In the result, the impugned order at annexure ‘F’ is quashed and set aside.

26. The writ petition is allowed. Rule is made absolute in terms of this order with no order as to costs.

(V.C. DAGA, J.)

(J.P. DEVADHAR, J.)